Supreme Court, U.S.
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No. 10-1154

In the
Supreme Court of the United States

PAUL O. ROHART, M.D.,
Petitioner,

v.

MELSAR RISK MANAGEMENT SERVICES, INC.,

ALLIANCE RISK MANAGEMENT SERVICES,

LLC,

AND COLUMBIA CASUALTY COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL, FLORIDA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Introduction:

The Health Care Quality Improvement Act of 1986 ["HCQIA"] required the development of the National Practitioner Data Bank, a data bank of medical malpractice payments, reasons for payments and peer review actions, as a means to improve the quality of medical care in the United States. *See* 42 U.S.C. § 11101(1). The effectiveness of the National Practitioner Data Bank is dependent upon the complete truth and accuracy of the information reported to the Data Bank.

42 U.S.C. § 11137(c) of the Health Care Quality Improvement Act of 1986 provides: "No person or entity (including the agency designated under Section 11134(b) of this title) shall be held liable in any civil action with respect to any report made under this subchapter ... without knowledge of the falsity of the information contained in the report."

Respondents have admitted that, in 2007, they reported material false information about the Petitioner to the National Practitioner Data Bank. The Respondents have, to date, refused to correct the false statements to the National Practitioner Data Bank. Respondents have admitted they defamed Petitioner. Nevertheless, the Florida courts refuse to enforce 42 U.S.C. § 11137(c) and compel Respondents to remove the false information about Petitioner from the National Practitioner Data Bank.

The Florida Courts have also deprived Petitioner of due process by attempting to preclude further review of their decision. The Supreme Court of the State of Florida lacks jurisdiction to review a per curiam affirmance without an opinion even if the decision is in conflict with a decision of another District Court of Appeal or of the Supreme Court. *See Dodi Pub. Co. v. Editorial America*, 385 So.2d 1369 (Fla. 1980). When a decision without an opinion is made, Florida's Rules of Appellate Procedure, at Rule 9.330(a), allow a party, in a motion for rehearing, to request a written opinion when the party believes it would provide a legitimate basis for Supreme Court review.

> "It seems to be settled law of this state that the duty of a court to apply to admitted facts a correct principle of law is such a fundamental and essential element of the judicial process that a litigant cannot be said to have a remedy by due course of law ... if the judge fails or refuses to perform that duty." *State v. Smith*, 118 So.2d 792, 795 (Fla. 1st DCA 1960); *Mathews v. Metropolitan Life Insurance Co.*, 89 So.2d 641, 642 (Fla. 1956).

By refusing to issue a written opinion, the Florida Court of Appeal has deprived Petitioner of the ability to seek review from the Florida Supreme Court.

Question 1:

Should this Court grant this Petition to address the Florida State Courts' failure to enforce 42 U.S.C. § 11137(c) by granting immunity to the defendants for reporting false information to the National Practitioner Data Bank with knowledge of its falsity?

Question 2:

Should this Court grant this Petition to address the deprivation of Petitioner's due process rights by refusing to issue an opinion when requested to do so, thereby depriving Petitioner of the ability to seek review from the State's highest court?

Question 3:

Should this Court grant this Petition and address the Florida State Court's disregard for the strong public policy favoring completely true and accurate information in the National Practitioner Data Bank by permitting the defendants to refuse to correct admittedly false information reported to the Data Bank?

PARTIES TO THE PROCEEDINGS

Petitioner

Paul O. Rohart, M.D is an emergency medicine physician.

Respondents

Melsar Risk Management Services, Inc. is a third party insurance administrator.

Alliance Risk Management Services, LLC is a third party insurance administrator.

Columbia Casualty Company is a medical malpractice insurer.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the decision of the Fourth District Court of Appeal, West Palm Beach, Florida. The Petition addresses an issue of national significance: the subversion of the integrity of the National Practitioner Data Bank by individuals reporting false information to the Data Bank and refusing to correct the false information.

The Data Bank is the vehicle used to implement the Health Care Quality Improvement Act of 1986 (42 U.S.C. §§ 11101 *et. seq.*). Destroying its integrity will jeopardize the continued implementation of the Health Care Quality Improvement Act of 1986.

OPINIONS BELOW

Fourth District Court of Appeal affirmance: App A. Circuit Court decision granting summary judgment: App B. Fourth District Court of Appeal denial of rehearing: App C.

JURISDICTION

Florida's Fourth District Court of Appeal affirmed *per curiam* the Circuit Court order granting summary judgment to defendants on December 1, 2010. Florida's Fourth District Court of Appeal denied Petitioner's motion for rehearing on December 22, 2010. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Supremacy Clause of the U.S. Constitution reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. Const. Art. VI, ¶ 2.

The Due Process Clause of the U.S. Constitution reads: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

Equal Protection Clause of the U.S. Constitution reads: "... or deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATUTE INVOLVED

42 U.S.C. § 11137(c) of the Health Care Quality Improvement Act of 1986 provides: "No person or entity (including the agency designated under Section 11134(b) of this title) shall be held liable in any civil action with respect to any report made under this subchapter ... without knowledge of the falsity of the information contained in the report."

STATEMENT OF THE CASE

Respondents, an insurer and two third party insurance administrators, settled a claim for alleged medical malpractice against the Petitioner for $12,500.00. The Petitioner was unaware of the settlement until after it had been executed. No medical malpractice suit had been filed against the Petitioner. The claimant was not injured by the Petitioner's treatment.

The Respondents then published career damaging false information to the National Practitioner Data Bank concerning the Petitioner. The National Practitioner Data Bank is maintained by the U.S. Government, and is used by hospitals and employers as a clearinghouse of medical malpractice settlement information concerning physicians and other medical and dental providers. The Respondents have been aware, for a number of years, of the falsity of the published information. The Respondents are aware that the information is damaging. The Petitioner has, for years, asked that the false information be corrected and/or removed by the Respondents, but they have refused to do so.

On August 7, 2007, Respondents falsely reported to the National Practitioner Data Bank that Petitioner had failed to diagnose a femur (upper leg) fracture when treating a patient (E.H.).

All Respondents have admitted, in May 2009, that the statement concerning the femur fracture was false.

On August 7, 2007, Respondents falsely reported to the National Practitioner Data Bank that the

Petitioner had failed to diagnose a fracture to the patient's spine.

Petitioner has produced evidence that he did diagnose an injury to the patient's spine. (Affidavit of M.H. Whiteman, M.D., neuro-radiologist). Also, Respondents have admitted that Petitioner did diagnose a fracture of the spine in their Answer Brief, filed 1/27/2010. But, Respondents still have not corrected the false statement to the National Practitioner Data Bank more than a year after this admission. The Respondents have admitted that they defamed the Petitioner.

The reporting of falsehoods concerning Dr. Rohart to the National Practitioner Data Bank is a central issue in Dr. Rohart's claims against the Respondents.

The case has four Defendants, Columbia Casualty Company, Melsar Risk Management Services, Inc., Alliance Risk Management Services, LLC and E.H. The Appellate decision, in the instant Petition, only includes the former three entities. The case has seven counts, two of which are: 1) Defamation, and 2) Bad Faith.

On August 10, 2009, the Circuit Court granted Respondents' summary judgment motion and stated the following:

> "DR. ROHART'S complaints that the reports refer to a fractured "femur" instead of a fractured "fibula" [lower leg] do not support his argument that the carrier reported false information. The Court finds that semantical [sic] error to be immaterial where the substance of the report was accurate, i.e.,

there was, in fact, a claim for medical negligence and there was, in fact a settlement to be reported. Babic, *supra*."

The Petitioner did present evidence, admissions by Respondents and an affidavit from an expert neuro-radiologist, to the Circuit Court that showed that the Respondents had reported false information to the National Practitioner Data Bank, but the Circuit Court granted the Respondents immunity for their false reporting.

Upon appeal to the Florida Fourth District Court of Appeal, the Petitioner, again, presented evidence of Respondents' false reporting to the National Practitioner Data Bank. The Fourth District Court, on December 1, 2010, affirmed the Circuit Court's grant of summary judgment without an opinion. On December 22, 2010, the Petitioner's motion for rehearing and a written opinion were denied.

The Supreme Court of the State of Florida lacks jurisdiction to review a per curiam affirmance without an opinion. *Dodi*, 385 So.2d 1369.

REASONS FOR GRANTING PETITION

POINT ONE: THE FLORIDA COURT OF APPEALS ESSENTIALLY REFUSED TO ENFORCE 42 U.S.C. § 11137(c) WHEN IT GRANTED IMMUNITY TO DEFENDANTS THAT KNOWINGLY MADE FALSE REPORTS TO THE NATIONAL PRACTITIONER DATA BANK.

The United States Court of Appeals for the Tenth Circuit, in a case similar to the instant case in which false information was reported to the National Practitioner Data Bank, found the reporting individual did not qualify for immunity under 42 U.S.C. § 11137(c) because the individual had reviewed the documentation and was aware of the contents of the documentation concerning the physician before filing the report. The Tenth Circuit concluded that "the record contains sufficient evidence from which a reasonable jury could have concluded the data bank report was false and [the reporter] knew of its falsity." *Brown, M.D. v. Presbyterian Healthcare Services*, 101 F.3d 1324, 1334 (10th Cir. 1996). The Respondents had reviewed the documentation concerning the Petitioner, were aware of the contents, and still reported false information. The instant case presented sufficient evidence for a jury, the Florida Circuit Court, and the Florida District Court of Appeal to conclude that the report against the Petitioner was and is false, and that the Respondents knew the report was false.

The National Practitioner Data Bank is a U.S. governmental agency that maintains insurance settlement information attributed to physicians and dentists. Hospitals and HMO's enquire into the National Practitioner Data Bank when they are considering credentialing for hospital staff privileges or hiring a physician. False information on the National Practitioner Data Bank cannot be changed by a physician. The Petitioner has given the National Practitioner Data Bank documentation of the falsehoods, but the Data Bank will only allow the individual who made the report to make a correction of the submitted report. False information, particularly damaging false information, will limit what employment is available to a physician. If a physician tells an employer that there is false information about him on the National Practitioner Data Bank, the employer will not believe him.

Institutions enquiring into the National Practitioner Data Bank assume that all information reported to the National Practitioner Data Bank is correct. The National Practitioner Data Bank Guidebook (the official operating manual for users of the National Practitioner Data Bank, a federal agency) states: "A Correction is a change intended to supersede the contents of the current version of a report. The reporting entity must submit a Correction as soon as possible after the discovery of an error or omission in a report." E-5 of Guidebook. The Respondents have been knowingly in violation of this rule for years. The individual who initially published the false information, J. Adler, Executive Vice President of Melsar Risk Management Services,

Inc. and a nurse, has testified that she is aware of the Guidebook.

J. Adler, Executive Vice President of Melsar Risk Management Services, Inc. and the nurse who reviewed all the medical records of the claimant and the Petitioner's treatment of the claimant has never corrected the admitted false statement, even after many requests to do so by the Petitioner.

In testimony, J. Adler, Melsar Risk Management Services, Inc., has stated that reports to the National Practitioner Data Bank "should be truthful." J. Adler has also testified that "[a]ny inaccurate statements should be corrected as soon as they are identified ... There should be no delay."

K. Matzka, CPMSM, CPCS, a nationally known expert, has testified that Respondents' false statements are material and that injury to Petitioner was substantially certain to occur as a result of this reporting. Petitioner has testified, by affidavit, that he suffered damages as a result of Respondents' actions.

The Supreme Court of Pennsylvania, in reviewing facts in which false information about a physician was supplied to the National Practitioner Data Bank and not corrected stated:

> "[T]he failure of the Hospital's Board of Directors to state that Dr. Hayes' initial suspension, not merely his "continued" suspension, was unwarranted may, if left unchallenged, continue to have a deleterious effect on Dr. Hayes' medical career. See *Cooper v. Delaware Valley Med. Ctr., 539 Pa. 620,*

> *628-29*, 654 A.2d 547, 551 (1995) (noting that '[f]inding gainful employment in the hospital setting after a poor review is unlikely as a result of the provisions of the [HCQIA]'). Because our resolution of the matter at issue will have a practical effect on Dr. Hayes' ability to challenge the Board of Directors' decision, and thus on Dr. Hayes' professional future, this appeal is not moot." *Hayes, M.D. v. Mercy Health Corp.*, 559 Pa. 21, 24, 739 A.2d 114, 116 (1999).

In *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So.2d 783 (Fla. 1980), the Florida Supreme Court outlined the insurer's duty to the insured: "An insurer in handling the defense of claims against the insured, has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise with the management of his own business." *Rogers v. Chicago Ins. Co.*, 964 So.2d 280, 282 (Fla. 4th DCA 2007). An ordinary and prudent person would not report an injurious falsehood concerning an insured, admit to the falsehood, and then refuse to correct the falsehood for years. The Respondents have acted in bad faith and in violation of their duty to the Petitioner.

Further proof of the defendants' malicious motive is found in the fact that they deprived Petitioner of his right to avoid having the improper settlement reported by paying it personally. 42 U.S.C. § 11101, *et seq.*, does not require the reporting of a settlement that is personally paid by the physician to the claimant. *American Dental*

Association v. Shalala, 3 F.3d 445 (C.A.D.C. 1993). The Respondents could have given Dr. Rohart the opportunity to pay the minimal amount of $12,500.00, and to eliminate a report to the National Practitioner Data Bank. A person of ordinary care would have given Dr. Rohart this opportunity.

Here, the Florida Court of Appeal subverted the very purpose of the Data Bank by permitting reports that were knowingly false to remain in the Data Bank, and it also violated the Supremacy Clause of the Constitution by essentially refusing to enforce a federal law. Accordingly, this petition should be granted.

A. False Reporting Subverts The Health Care Quality Improvement Act Of 1986 Because It Defeats The Law's Purpose Of Ensuring The Availability Of True And Accurate Information Regarding Medical Professionals.

The National Practitioner Data Bank ("NPDB") is an electronic repository of all payments, and related information, made on behalf of physicians in connection with medical liability settlements or judgments as well as adverse peer review actions against licenses, clinical privileges, and professional society memberships of physicians and other health care practitioners. The NPDB was established by Congress as part of the Health Care Quality Improvement Act of 1986 (42 U.S.C. § 11101, *et seq.*). The purpose of the NPDB is to "improve the quality of medical care" in the United States. 42 U.S.C. § 11101(1). The NPDB is required to make this

information available to hospitals, state licensure boards, and some professional societies.

The NPDB demands that only correct and accurate information be reported. If incorrect and/or inaccurate information is reported, it must be corrected immediately upon becoming aware of the inaccuracy. This is the only way to maintain the integrity of the Data Bank and to ensure that it will be able to accomplish the intent of the Health Care Quality Improvement Act of 1986.

Hospitals and HMO's review the information in the National Practitioner Data Bank when they are considering credentialing for hospital staff membership or before hiring a physician. Institutions enquiring into the National Practitioner Data Bank assume that all information reported to the National Practitioner Data Bank is correct. False information being reported to the NPDB will erode the credibility of the Data Bank and destroy the ability of the Data Bank to "improve the quality of medical care."

Allowing false information to be published, and maintained, on the NPDB will destroy the validity of the NPDB. Accordingly, the Florida Circuit Court and Florida Fourth District Court of Appeal decisions to grant immunity, in contradiction to the plain language of 42 U.S.C. § 11137(c), cannot be allowed to stand. It would send the wrong message to others reporting to the NPDB and those inquiring into the NPDB.

B. The Florida Courts Violated The Supremacy Clause Of The United States Constitution By Failing To Honor Their Duty To Enforce Federal Law Because They Granted Immunity For The Knowingly False Reports To The NPDB In Violation of 42 U.S.C. § 11137(c).

The Florida Circuit Court and the Florida Fourth District Court of Appeal had the duty to enforce federal law, but did not.

"This Constitution, and the Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby ...." U.S. Const. Art. VI, ¶ 2.

The leading case recognizing the duty of state courts to enforce federal law is *Testa v. Katt*, 330 U.S. 386, 67 S. Ct. 810, 91 L. Ed. 967 (1947). The *Testa* Court relied heavily upon its prior decisions in *Claflin v. Houseman*, 93 U.S. 130, 23 L. Ed. 833 (1876) and *Mondou v. New York, New Haven & Hartford R.R.*, 223 U.S. 1, 32 S. Ct. 11, 99 L. Ed. 11 (1912). The *Testa* Court, in referencing *Claflin v. Houseman* stated that the Supremacy Clause makes Federal law the "supreme Law of the Land," and the states cannot disregard the policy behind federal statute in favor of their own. In referencing *Mondou* the *Testa* Court stated: "When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all." *Testa* at 392.

The Circuit Court and the Appellate Court were both given evidence that the Respondents had reported false information to the National Practitioner Data Bank.

42 U.S.C. § 11137(c) of the Health Care Quality Improvement Act of 1986 provides: "No person or entity (including the agency designated under Section 11134(b) of this title) shall be held liable in any civil action with respect to any report made under this subchapter ... without knowledge of the falsity of the information contained in the report." The Respondents did not have immunity.

The order of the Trial Court granting summary judgment to the Respondents specifically acknowledged 42 U.S.C. § 11137, acknowledged the admitted false reporting by the Respondents, and then granted immunity to the Respondents for their false reporting.

The Appellate Court, by its affirmance, ignored the requirement to enforce 42 U.S.C. § 11137(c).

Accordingly, both the Circuit Court and the Fourth District Court of Appeal violated the Supremacy Clause by failing to honor their obligation to enforce the Health Care Quality Improvement Act Of 1986 by allowing knowingly false information to be reported to the NPDB. Therefore, this Petition should be granted.

POINT TWO: THE FLORIDA COURTS DEPRIVED PETITIONER OF DUE PROCESS AND EQUAL PROTECTION OF LAW BECAUSE THEY FAILED TO APPLY THE LAW TO THE ADMITTED FACTS AND BECAUSE THEY DEPRIVED PETITIONER OF FURTHER APPELLATE REVIEW BY REFUSING TO ISSUE A WRITTEN OPINION.

The Court has held that "virtually all" of the individual rights found in the Bill of Rights apply to the States through the Due Process Clause of the Fourteenth Amendment. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 34, 111 S. Ct. 1032, 113 L. Ed.2d 1 (1991). Under the doctrine of selective incorporation, these rights have been applied to the States because they are considered "fundamental"—that is, "necessary to an Anglo-American regime of ordered liberty." *Duncan v. Louisiana*, 391 U.S. 145, 149, n.14, 88 S. Ct. 1444, 20 L. Ed.2d 491 (1968).

The Court, in *Mathews v. Eldridge*, 424 U.S. 319, 332-335 (1976), has stated that the resolution of the constitutional sufficiency of due process procedures requires the consideration of three factors: 1) the private interest that will be affected by the official action; 2) the risk of erroneous deprivation of such interest through the procedures used and probable value, if any, of additional procedural safeguards; and 3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.

The Equal Protection Clause of the U.S. Constitution reads: "... or deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Petitioner had the right to expect that the Florida Courts would apply 42 U.S.C. § 11137(c) to the facts. *Testa,* 330 U.S. 386.

The risk of erroneous deprivation to the Petitioner was certain by the failure of the Florida Courts to apply 42 U.S.C. § 11137(c) as required by Art. VI, ¶ 2 of the U.S. Constitution.

The State of Florida cannot show that it had any interest in depriving the Petitioner of his right to due process and equal protection. There can be no burden to the State of Florida in honoring its obligations under Art. VI, ¶ 2 of the U.S. Constitution.

> "It seems to be settled law of this state that the duty of a court to apply to admitted facts a correct principle of law is such a fundamental and essential element of the judicial process that a litigant cannot be said to have a remedy by due course of law ... if the judge fails or refuses to perform that duty." *State v. Smith,* 118 So.2d 792, 795 (Fla. 1st DCA 1960); *Mathews v. Metropolitan Life Insurance Co.,* 89 So.2d 641, 642 (Fla. 1956).

The Florida Circuit Court and the Florida Fourth District Court of Appeal failed to apply 42 U.S.C. § 11137(c) to the admitted facts. The Florida Courts were aware of the facts and the law.

The Florida Fourth District Court of Appeal and Florida Circuit Court denied the Petitioner due process and equal protection under the law.

The Fourth District Court's affirmance without an opinion insured that the Petitioner would not have the ability to seek review by the Florida Supreme Court. *Dodi*, 385 So.2d 1369. Eliminating the Petitioner's ability to seek review from the Florida Supreme Court when a Federal statute was not applied to admitted facts compounds the due process and equal protection deprivation.

In the instant case, a decision without an opinion offends the principle that justice must be rendered in public and subjects the litigants to secret justice. *Ex parte McCarthy*, [1924] 1 K.B. 256, 259 (1923) ("Justice should not only be done, but should be manifestly and undoubtedly be seen to be done."). *Offutt v. United States*, 348 U.S. 11, 14, 99 L. Ed 11, 75 S. Ct. 11 (1954) ("Justice must satisfy the appearance of justice."). The appearance of justice is undermined when an opinion is not given, and when a request for an opinion is denied. Particularly, as Florida's Rules of Appellate Procedure, at Rule 9.330(a), allow a party to request a written opinion when the party believes it would provide a legitimate basis for Supreme Court review.

Since a reviewing Court would be unable to determine if the decision-maker's findings were supported by the evidence, a written statement facilitates appellate review. *Black v. Romano*, 471 U.S. 606, 606, 105 S. Ct. 2254, 85 L. Ed.2d 636

(1985); *Specht v. Patterson*, 386 U.S. 605, 610, 87 S. Ct. 1209, 1212, 18 L. Ed.2d 326, 330 (1967).

"When written reasons would contribute significantly to the 'fairness and reliability' of the process by which an individual is deprived of liberty or property ... reasons must be given ... unless the balance between the individual interest affected and the burden to the government tilts against the individual." *Black v. Romano* at 618 quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

"The touchstone of due process is the protection of the individual against the arbitrary action of the government." *Black v. Romano* at 624.

POINT THREE: THE FLORIDA COURTS VIOLATED PUBLIC POLICY BY PERMITTING KNOWINGLY FALSE INFORMATION TO BE REPORTED TO THE NATIONAL PRACTITIONER DATA BASE.

The purpose of the NPDB is to improve the quality of medical care in the United States by providing information on all payments and related information in connection with medical liability settlements or judgments, and on adverse actions on a medical professional's license, clinical privileges, or professional society memberships. See Point One, *supra*. Recognizing that the integrity of this information is paramount for the NPDB to achieve its purpose, as well as the catastrophic effect that false information in this database could have on a medical professional's career, the law demands that the information reported to the NPDB be correct and

accurate, and that any inaccuracies or incorrect information be immediately corrected by the person or entity that reported the data. Meanwhile, permitting false information to remain in the NPDB would erode its credibility and destroy its utility as a means to improve the quality of medical care.

Nevertheless, the Florida Courts permitted that very thing to happen. Despite the plain language of the applicable statute prohibiting knowingly false reports and the admitted falsity of the defendants' reports concerning Dr. Rohart, the Florida Courts granted immunity to the defendants. Because the defendants are the only ones that can correct the false information they reported to the NPDB concerning Dr. Rohart, granting them immunity in contravention of 42 U.S.C. § 11137(c) ensures that the false information will remain in the database, tainting both Dr. Rohart and the NPDB's integrity. This is in direct conflict with the public policy behind and the purpose of the Health Care Quality Improvement Act Of 1986. Accordingly, this Petition should be granted.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM DECISION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT DATED DECEMBER 1, 2010

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT
July Term 2010

No. 4D09-3396

[December 1, 2010]

PAUL O. ROHART, M.D.,
v.
Appellant,

MELSAR RISK MANAGEMENT SERVICES, INC., ALLIANCE RISK MANAGEMENT SERVICES, LLC, COLUMBIA CASUALTY COMPANY AND E.H.,
Appellees.

PER CURIAM.

Affirmed.

Warner, Polen and Farmer, JJ., concur.

* * *

Appeal from the Circuit Court for the

Seventeenth Judicial Circuit, Broward County; John T. Luzzo, Judge; L.T. Case No. 08-26446 CACE.

William T. Cushing, Cary, North Carolina, for appellant.

Debra Potter Klauber of Haliczer, Pettis & Schwamm, Fort Lauderdale, for appellees Melsar Risk Management Services, Inc., Alliance Risk Management Services, LLC, and Columbia Casualty company.

APPENDIX B —ORDER OF THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA DATED August 10, 2009

IN THE CIRCUIT COURT OF THE 17th JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

JUDGE: JOHN T. LUZZO.

Case No. CACE 08 - 26446 (18)

PAUL O. ROHART, M.D.,

Plaintiff,

vs.

MELSAR RISK MANAGEMENT SERVICES, INC., ALLIANCE RISK MANAGEMENT SERVICES, LLC, COLUMBIA CASUALTY COMPANY and E.H.,

Defendants.

ORDER GRANTING MOTION FOR FINAL SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS', MELSAR RISK MANAGEMENT SERVICES, INC., ALLIANCE RISK MANAGEMENT SERVICES, LLC, COLUMBIA CASUALTY COMPANY

This matter having come before the Court on Monday, July 27, 2009, on the Defendants', MELSAR RISK MANAGEMENT SERVICES, INC., ALLIANCE RISK MANAGEMENT SERVICES, LLC, COLUMBIA CASUALTY COMPANY's Motion for Summary Judgment, and the court having reviewed the motions and memoranda of law and documents attached thereto, and having heard arguments of counsel, and being otherwise fully advised in the premises, hereby enters its Findings of Fact and Conclusions of Law as follows:

A. Findings of Fact

The Court finds that the following facts are undisputed.[1] The Plaintiff, PAUL ROHART, M.D., an emergency medicine room physician, treated the Defendant/Patient, E.H., in the emergency room at Broward General Medical Center on May 22, 2005, following a car accident. E.H. later complained that DR.ROHART failed to

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[1] DR. ROHART has objected to the Defendants use of its claims file documents as evidence In support of the Motion for Summary Judgment. However, this Court had based its findings on the documents submitted to the Court by DR. ROHART and, therefore, his Motion to Strike the use of these exhibits is denied as moot.

diagnose a fibula fracture, and further failed to communicate to her that she had fractured her back. The Defendant, COLUMBIA CASUALTY COMPANY, was DR. ROHART'S medical malpractice carrier, which had issued a policy with $1,000,000 in coverage for professional negligence claims. COLUMBIA CASUALTY COMPANY retained the services of MELSAR RISK MANAGEMENT SERVICES, INC. and ALLIANCE RISK MANAGEMENT SERVICES, LLC to investigate and handle the claim.[2]

In or about March of 2007, E.H. and, MELSAR RISK MANAGEMENT SERVICES, INC. agreed to resolve the claim for $12,500,[3] and the

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[2] DR. ROHART objects to COLUMBIA CASUALTY COMPANY's use of these third party administrators/adjusters in this case. However, the record reflects that the actual adjuster who handled the claim was, in fact, an independent licensed adjuster in the State of Florida. Nevertheless, DR. ROHART's allegations still fail to state a civil claim against COLUMBIA CASUALTY COMPANY. Such a claim, if it had merit does not give rise to an independent cause of action against the carrier.

[3] DR. ROHART'S challenge that the settlement was effectuated after the statute of limitations had expired is misplaced. The record clearly reflects that there was a meeting of the minds by the parties as to the amount and terms of the settlement by, at least,

settlement release was signed on March 30, 2007.[4] After the settlement was effectuated, it was reported to the State of Florida, Department of Health, and the National Practitioner's Data Bank, through the United States Department of Health and Human Services.

DR. ROHART took issue with the settlement and filed this action. His lawsuit names, as Defendants, his medical malpractice insurance company (COLUMBIA CASUALTY COMPANY), the third party administrators and/or adjusters who handled the investigation and settlement

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May 14, 2007, more than a week before the statute of limitations expired.

[4] Again, DR. ROHART's argument about the language utilized in the release does not affect the Defendants' entitlement to immunity here, while he claims that the release did not include language required by §766.113, the Court finds that the settlement agreement and the reports include similar language noting that the settlement did not, necessarily, imply negligence on the part of the health care providers released therein. Furthermore the statute itself does not provide that the failure to utilize that exact language will result in voiding the release and, absent such language, this Court will not do so. See, e.g. RTG Furniture Corp. v. Ind. Risk Ins., 2008 WL 4541022 (S.D. Fla. 2008); Chalfonte Condominium Apt. Ass'n., Inc. v. QBE Ins. Corp., 526 D. Supp 2s 1251 (S.D. Fla. 2007).

(ALLIANCE RISK MANAGEMENT SERVICES, LLC and MELSAR RISK MANGEMENT SERVICES, INC.), and the patient (E.H.). In his Complaint, DR. ROHART alleges that he never engaged in malpractice and that the defendants' actions in settling the claim and reporting it to the State of Florida and the National Practitioners' data bank have caused him damages. His Complaint includes counts against various Defendants for: breach of contract, bad faith, unfair claim settlement practices, defamation, fraudulent misrepresentation, negligence and civil conspiracy.

B. Conclusions of Law

This Court finds that the Plaintiff's claims fail as a matter of law. First, the insurance policy at issue in this case specifically grants the insurance company, or its designees, the right and duty to investigate and settle any claims. Second, §627.4147 of the Florida statutes gave the Defendants the exclusive authority to resolve this medical malpractice claim within the policy limits. See §627.4147(1)(b), Fla. Stat.[5]

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[5] Since the carrier contractually and legally had the right and duty to investigate and settle the claim within policy limits, the Court also finds that it was within the carrier's discretion to forego any

Likewise, once the settlement in this case was effectuated, both Florida and federal statutes required the settlement to be reported to the appropriate entities. Section 627.912 of the Florida Statutes required the Defendants to report the medical malpractice settlement to the State of Florida, Department of Health. See §627.912(1)(a), Fla. Stat. Similarly, the Health Care Quality Improvement Act (HCQIA), set forth at 42 U.S.C. § 11101, et seq., required the Defendants to report the medical malpractice settlement to the National Practitioner's Data Bank. See 42 U.S.C. § 11131.

Importantly, those state and federal statutes provide immunity to those Defendants for making those reports. The Florida Statute specifically states, "there shall be no liability on the part of, and no cause of

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formalities required by Chapter 766. The purpose of those statutes is to facilitate the amicable resolution of claims, which is what happened here, Archer v. Maddox, 645 So. 2d 544 (Fla. 1st DCA 1944); Ingersoll v. Hoffman, 589 So. 2d 223 (Fla. 1992); VonDrask v. City of St. Petersburg, 777 So. 2d 989 (Fla. 2d DCA 2000). Defendants have been deemed to waive these presuit requirements in a number of cases. See, e.g., Ingersoll, 589 So. 2d at 224; Florida Hospital Waterman v. Stoll, 855 So. 2d 271 (Fla. 5th DCA 2003).

action of any nature shall arise against, any person or entity reporting hereunder or its agents or employees ... for any action taken by them under this section." §627.912(4), Fla. Stat. The federal statute similarly states that "no person or entity ... shall he held liable in any civil action with respect to any report made under this subchapter ... without knowledge of the falsity of the information contained in the report." 42 U.S.C. § 11137.

The Florida courts have considered claims like those presented by DR. ROHART here, i.e., claims filed by disgruntled physicians who are challenging the insurance carrier's decision to settle a medical malpractice claim. Those courts have uniformly concluded that the Defendants are entitled to statutory immunity from any and all such claims or causes of action. See. e.g.,Shuster v. South Broward Hospital District, 591 So. 2d 174 (Fla. 1992)("the act of settling a claim ... for nuisance value, is not bad faith performance" when that amount is within the policy limits); Freeman v. Cohen, 969 So. 2d 1150 (Fla. 4th DCA 2008)("the only bad faith action available to the insured when a carrier settles a claim against the insured within the policy limits is one alleging prejudice to a pending counterclaim of the insured or exposure of the insured to additional damages above policy limits"); Rogers v. Chicago Ins. Co., 964 So. 2d

280 (Fla. 4th DCA 2007)(finding that a physician had no cause of action to recover collateral damages from the carrier, as the "carrier has exclusive authority to control settlement and to be guided by its own self interest when settling the claim for amounts within the policy limits"); Babic v. Physicians Protective Trust Fund, 738 So. 2d 442 (Fla. 4th DCA 1999)(dismissing claims for breach of fiduciary duty based on a finding that the carrier had the right to settle the case as it deemed expedient with or without the physician's consent or approval); Sharpe v. Physicians Protective Trust Fund, 578 So. 2d 806 (Fla. 1st DCA 1991) (allegations that "do no more than questions [the carrier's] exercise of judgment in settling a malpractice claim" do not equate with bad faith, constitute a breach of contract, or state a claim for negligence).

Based on the foregoing authorities, the Defendants not only had the right to resolve the medical malpractice claim for an amount within the policy limits, but are immune from reporting that information to the State of Florida and/or the National Practitioner's Data Bank. Here, as in Babic, "the report clearly reflects the facts that there was a claim of medical malpractice asserted against [the physician] and ... the claim was settled ... There is no 'falsity of information' in this report. This is not a situation where [the carrier] has falsely reported a claim and a

settlement for the physician which never existed." Babic, 738 So.2d at 446."[6] Accordingly, the Defendants are entitled to immunity and none of the arguments raised by DR. ROHART affect their entitlement to be immune from suit under the facts of this case.

IT IS HEREBY ORDERED AND ADJUDGED that the Defendants, COLUMBIA CASUALTY COMPANY, MELSAR RISK MANAGEMENT SERVICES, INC., ALLIANCE RISK MANAGEMENT SERVICES, LLC, Motion for Summary Judgment is GRANTED. The reserves jurisdiction to address attorneys' fees and costs.

DONE AND ORDER on this 10 day of August, 2009, at Chambers at Fort Lauderdale, Broward County, Florida.

Honorable John T. Luzzo
Circuit Court Judge
CIRCUIT COURT JUDGE

[6] DR. ROHART'S complaints that the reports refer to a fractured "femur" instead of a fractured "fibula" do not support his argument that the carrier reported false information. The Court finds that semantical error to be immaterial where the substance of the report was accurate, i.e., there was, in fact, a claim for medical negligence and there was in fact a settlement to be reported. Babic, *supra*.

APPENDIX C — ORDER OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT DATED December 22, 2010

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, 1525 PALM BEACH LAKES BLVD., WEST PALM BEACH, FL 33401

CASE NO.: 4D09-3396
L.T. No.: CACE 08-26446

December 22, 2010

PAUL O. ROHART, M.D.
Appellant / Petitioner(s),

v.

MELSAR RISK MANAGEMENT SERVICES, ETC., ET AL.
Appellees / Respondent(s).

BY ORDER OF THE COURT:

ORDERED that appellant's motion filed DECEMBER 7, 2010, for rehearing and request for an opinion is hereby denied.

ORDERED that appellant's motion filed December 8,

2010, for reconsideration of order granting attorney's fees as to § 57.105 is hereby denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.
/s/_____
MARILYN BEUTTENMULLER, Clerk Fourth District Court of Appeal